Employer Status Determination

Marietta Industrial Enterprises, Inc.
(doing business as Dock Side, Inc.)

This is the decision of the Railroad Retirement Board with respect to the status under the Railroad Retirement and Railroad Unemployment Insurance Acts of Marietta Industrial Enterprises, Inc. (doing business as Dock Side, Inc.) (MIE).

The following is based on information provided in letters dated November 13 and December 27, 1991, and March 20 and May 28, 1992, from Mr. Thomas L. Rose, Controller/Treasurer of MIE, and on information obtained by the Railroad Retirement Board in connection with its employer status determination as to Little Kanawha River Rail, Inc. (LKRR).

LKRR was held on July 25, 1990, to be a rail carrier employer covered under the Acts effective August 1, 1989, the date on which it began conducting rail operations. Although Mr. Rose has stated that "LKRR is owned by individuals who have less than 75% ownership of MIE", he now advises that MIE is owned in equal shares by W. Scott Elliott, Burt M. Elliott, R. Grant Elliott, and Cheryl L. Rose, while LKRR is owned in equal shares by W. Scott Elliott, Burt M. Elliott, and R. Grant Elliott. Accordingly, exactly 75 percent of the ownership of MIE owns 100 percent of LKRR. In his letter of December 27, 1991, Mr. Rose stated that the line in question serves "Ames Tools, AB Chance, Badger Lumber, Dock Side and CSX." In his letter of November 13, 1991, Mr. Rose stated that LKRR has no employees and the line is operated by MIE employees. Four to six such employees "may work on the railroad in any given pay period." The work "might require two hours/day or less." In addition there are many days "that the railroad does not operate." MIE and LKRR have the same address and telephone number.

In his most recent letter, Mr. Rose states that MIE has 125 employees and that its operations include:

* Warehousing and JIT programs for local industry[.]

* Metals Division which crushes, sizes, packages and quality controls Ferro Alloys, Bauxite, etc.

* Trucking division which supports JIT programs, Metals Division, Plastics Division & Limestone.

* Wholesale and Retail of Limestone and related aggregates.

* Plastics Division which grinds, screens, packages

and quality controls plastic and rubberized material for local industries.

* Plastics Recycling Division which separates, grinds, cleans, extrudes, and quality controls recycled plastics.

* River Division which loads and unloads coal and coke materials along the Ohio, Kanawha & Little Kanawha Rivers for various industry. [This] Division also supports two harbor towboats.

* Construction division which does rip-rap work along the rivers for the railroad, industry, and private property owners. This division is also involved in boat ramp construction for various municipalities.

Mr. Rose also indicates as follows:

> More than 80 percent of LKRR's operations take place on a private siding that has been constructed so that coke/coal can be unloaded from river barges directly into rail cars. The only services offered to any outside companies are the occa[s]ional switching of cars for A.B. Chance and O. Ames Company.

Section 1(a)(1) of the Railroad Retirement Act defines the term "employer," in pertinent part, as follows:

> The term "employer" shall include--
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> (i) any express company, sleeping-car company, and carrier by railroad, subject to subchapter I of chapter 105 of Title 49;
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> (ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad * * *."

Section 202.5 of the Board's regulations (20 CFR 202.5) defines a company under common control with a carrier as one controlled by the same person or persons who control a rail carrier. From the information provided by Mr. Rose, it is clear that a controlling interest in MIE (three of four owners of MIE) owns 100 percent of LKRR. Accordingly, MIE is under common control with a railroad employer by reason of its commonality of ownership with LKRR.

The question then becomes whether MIE performs a service in connection with railroad transportation. Section 202.7 of the regulations (20 CFR 202.7) defines a service in as connection with railroad transportation if it is reasonably directly related, functionally or economically, to the performance of rail carrier obligations. Since MIE's rail-related service is the actual operation of LKRR's train, it is clear that that service is reasonably directed related, functionally or economically, to the performance of rail carrier obligations.

Section 202.6 of the regulations of the Board, implementing the casual service exception contained in section 1(a)(1)(ii) of the Railroad Retirement Act, quoted above, provides that:

> The service rendered or the operation of equipment of facilities by a controlled company or person in connection with the transportation of passengers or property by railroad is `casual' whenever such service or operation is so irregular or infrequent as to afford no substantial basis for an inference that such service or operation will be repeated, or whenever such service or operation is insubstantial. [20 CFR 202.6.]

While there is no direct information available as to the amount of income generated by services provided by MIE in connection with rail transportation, in view of LKRR's gross income being less than two percent of MIE's gross income ($180,000.00 as compared with $10,308.938.00) it must be inferred that the services rendered by MIE for LKRR clearly constitute an insubstantial portion of the operations of MIE. On this basis, the Board concludes that the services being performed by MIE for its rail carrier affiliate are casual, and accordingly, that MIE is not an employer under the Acts. Cf Rev. Rul. 84-91, 1984-1 C.B. 203, which held that the performance of services in connection with rail transportation was casual where the activities in question constituted less than 4% of the related company's activities.

II.

Another issue in this case is whether the employees of MIE performing services for LKRR should be regarded as employees of LKRR while performing the services in question. Section 1(b) of the Railroad Retirement Act and section 1(d) of the Railroad Unemployment Insurance Act both define a covered employee as an individual in the service of an employer for compensation. Section 1(d)(1) of the Railroad Retirement Act further defines an individual as "in the service of an employer" when:

> (i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and
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> (ii) he renders such service for compensation * * *.

Section 1(e) of the Railroad Unemployment Insurance act contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the Railroad Retirement Tax Act (26 U.S.C. §§ 3231(b) and (d)).

The focus of the test under paragraph (A) is whether the individual performing the service is subject to the control of the service-recipient not only with respect to the outcome of his work but also in the way he performs such work.

A rail carrier subject to the Interstate Commerce Act is under a duty to provide locomotives and cars to transport the public's property as part of its operation as a carrier. The law of agency recognizes that certain duties owed to third parties are so essential under the law that responsibility for their proper performance must be retained by the principal or employer. See Restatement (Second) of Agency § 214. The Board believes that operation of train service is a function so essential to the statutory duty of a rail carrier to provide rail transportation that the carrier must retain the power to direct and control the individuals who conduct the service. Cf. Annotation, What Employees are Engaged in Interstate Commerce within the Federal Employers' Liability Act, 10 A.L.R. 1184 (1921), at 1220-1226; and

Annotation, Who is an Employee in Interstate Commerce within Federal Employers' Liability Act as Amended in 1939, 10 A.L.R. 2d 1279, 1296 (1950), (both discussing liability of the railroad for injuries to locomotive engineers, firemen, brakemen and conductors). Finally, regulations of the Board provide that where an individual is subject to the direction and control of an employer, the employee relationship is established "irrespective of whether the right to supervise and direct is exercised." See 20 CFR 203.3(b).

The individuals provided to LKRR by MIE act as crew for the trains which LKRR must run in satisfaction of its rail carrier obligation. LKRR must retain ultimate control of the performance of its service as a common carrier. Accordingly, it is the determination of the Board that service performed by employees of MIE as crew for LKRR trains is creditable as service as employees of LKRR under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Glen L. Bower

V. M. Speakman, Jr.

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The question presented here is whether the individuals working for MIE in its operation of the LKRR are subject to the direction and control of the LKRR in the manner of rendition of the service.

It has been held that, under certain circumstances, the employees of a party which contracts to perform a service for a railroad employer may be considered to be in the service of the railroad employer within the meaning of section 1(d)(1) of the Railroad Retirement Act. A prime consideration in determining whether an individual is subject to the continuing authority of a railroad in the performance of his service is whether or not the services performed are of a nature which the railroad could delegate and place beyond its control and still claim to operate its railroad and carrier activities. Wabash R.R. Co. v. Finnegan, 67 F. Supp. 94, 99 (E.D. Mo., 1946). The fact that such individuals may be nominally on the payroll of another company may be disregarded. Utah Copper Co. v. Railroad Retirement Board, 129 F. 2d 358, 362 (10th Cir., 1942). The duty of the MIE personnel in performing the service in question is to operate the rail line which comprises the business of LKRR. Since the LKRR must direct its own operations, the individuals running the line must be acting[1] at the direction or control of the LKRR while performing those services.

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[1]Reynolds v. Northern Pacific Railway Company, 168 F. 2d 934 (8th Cir. 1948), concerned companies which provided boarding comp and other services to railroads.

The Court stated, at page 940.

> xxxOnly by adopting the premise that the functional aspect and integral relationship of the services to railroad operations were such that the railroad could not possibly have surrendered vital control and direction would i be at all possible to conclude on the record before us that the workers were subject to the continuing authority of the employer to supervise and direct, in a manner and to the extent necessary to regard them as railroad employees under the statute. But that broad and abstract premise is not warranted by the history or the contracting enterprises, the long-recognized economic relationships involved, and the language of the statute is the light or the 1946 amendment and its purpose.

The case was decided based on the law in effect prior to the 1946 amendments and the Court stated that the addition of the language "or he is rendering, on the property used in the employer's operations, other personal services the rendition o which is integrated into the employer's operations" was intended to cover the situation before the Court, which tended to support the conclusion that the pre-1946 amendments language was not intended to cover it.

Reynolds is distinguishable from the instant case in that MIE is not an independent contractor and there is no long-term history of contractual provision of the services in question. In any case, the services are covered under the Acts by reason of the "integration" language quoted above.

In Utah Copper Company, Bingham and Garfield Railway Company, et al., Board Order 40-570, affirmed in Utah copper, cited above, the Board concluded that individuals performing service in connection with the movement of trains were employees of the rial carrier, despite payment of their salaries by another company. Accordingly, it is the decision of the Board that individuals operating the LKRR line are employees of the LKRR under the test provided under paragraph (A) to the extent of their service to the LKRR.

The tests set forth under paragraphs (B) and (C) go beyond the supervision/direction test in paragraph (A) and would hold an individual a covered employee if he is integrated into the railroad's operations even though the control test in paragraph (A) is not met. In applying paragraphs (B) and (c) this agency has followed Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F. 2d 831 (8th Cir. 1953), and has not applied paragraphs (B) and (C) to cover employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business and the arrangement has not been established primarily to avoid coverage under the Acts. In the instant case Kelm does not apply as MIE and LKRR are under common control. Accordingly, the Board finds that the service to LKRR rendered by the MIE employees in question is also covered under section 1(d)(1(i)(C), since those employees are "rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations * * * ."

It may be noted that the amendments to the Railroad Retirement and Railroad Unemployment Insurance Acts in 1946 (Public Law 572, 79th Cong., section 1 (60 Stat. 722) made it clear that individuals performing professional services as part of the staff of an employer and personal services on the employer's property which are integrated into the employer's operations, under contract with a carrier, were employees within the meaning of the Acts, regardless of actual supervision.

Glen L. Bower

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MIE has not obtained ICC authority for its operation of the LKRR rail line or applied for an exemption from that authority. However, that fact is not determinative of coverage under the Acts administered by the Board. As indicated above, the Railroad Retirement Act covers any carrier by railroad subject to the Interstate Commerce Act. The Interstate Commerce Act defines "carrier" in part as a "common carrier," and a "common carrier" as including "a rail carrier" (49 U.S.C. § 10102). A "rail carrier" is defined as a "person providing railroad transportation for compensation" ("person" is defined by incorporation of 1 U.S.C. §1 to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies"). As stated by an officer of MIE, employees of MIE actually conduct the rail operation of LKRR. LKKR has been determined to be a covered employer engaged in interstate commerce. As a "person providing railroad transportation for compensation," MIE would be a rail carrier under the Interstate Commerce Act and therefore would be a carrier under the Railroad Retirement Act by reason of its being subject to the Interstate Commerce Act. It may be considered that the Railroad Retirement Act covers "substantially all those organizations which are intimately related to the transportation of passengers or property by railroad in the United States. S. Rep. No. 818, 75th Cong. 1st Sess. 4 (1937)." Standard Office Bldg. Corp. v. U.S., 819 F. 2d 1371, 1376 (7th Cir. 1987). Accordingly, the Board finds that MIE is a rail carrier employer providing carrier services under the Railroad Retirement and Railroad Unemployment Insurance Acts when providing rail services to LKRR, effective August 1, 1989, the date on which LKRR became a rail carrier employer covered under the Acts.

Section 202.3 of the regulations of the Board provides that:

> (a) With respect to any company or person principally engaged in business other than carrier business, but which, in addition to such principal business, engages in some carrier business, the Board will require submission of information pertaining to the history and all operations of such company or person with a view to determining whether some identifiable and separable enterprise conducted by the person or company is to be considered to be the employer. The determination will be made in the light of considerations such as the following:
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> (1) The primary purpose of the company or person on the since the date it was established;

(2) The functional dominance or subservience of its carrier business in relation to its non-carrier business;

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> (3) The amount of its carrier business and the ratio of such business to its entire business;
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> (4) Whether its carrier business is a separate and distinct enterprise.
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> (b) In the event that the employer is found to be an aggregate of persons or legal entities or less than the whole of a legal entity or a person operating in only one of several capacities, then the unit or units competent to assume legal obligations shall be responsible for the discharge of the duties of the employer. (Emphasis added.)

In this case, there appears to be no identifiable separate and distinct enterprise conducting carrier business (i.e., there is no segregable unit of MIE) which can be considered to be the employer; rather, MIE acts as a rail carrier employer while its employees are engaged in conducting the rail operations of LKRR. MIE as an employer covered under the Acts is thus "less than the whole of a legal entity".

In the past fiscal year MIE had gross income of $10,645,730.00 and a payroll of $2,308,938.00. LKRR had gross income of $180,000.00. All LKRR employees were subcontracted for through MIE. Since MIE is not predominantly engaged in carrier business, and its only carrier business is the operation of LKRR, it is the determination of the Board that section 202.3 of the Board's regulations applies so that MIE is a covered employer only to the extent that its employees engage in the operation of LKRR and only service performed while conducting LKRR's rail operations is creditable under the RR and RUI Acts, effective August 1, 1989.

I.

From the information provided by Mr. Rose it is clear that a controlling interest in MIE (three of four owners of MIE) owns 100 percent of LKRR. The Board has previously held that a rail carrier and a non-carrier parent are under common control. See Board Order 82-140, Appeal of Itel Corporation, wherein a majority of the Board affirmed and adopted the determination of the General Counsel that the Rail Division of Itel was under common control with the railroad employers owned by Itel. This determination was reversed on other grounds by the seventh Circuit. Itel v. Railroad Retirement Board, 710 F. 2d 1243 (7th Cir. 1983). It is clear that MIE is not a rail carrier. Section 202.5 of the Board's regulations (20 CFR 202.5) defines a company under common control with a carrier as one controlled by the same person or persons which control a rail carrier. Accordingly, MIE is under common control with a railroad employer by reason of its ownership of LKRR.

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Section 202.6 of the regulations of the Board, implementing the casual service exception contained in section 1(a)(1)(ii) of the Railroad Retirement Act, quoted above, provides that:

> "The service rendered or the operation of equipment or facilities by a controlled company or person in connection with the transportation of passengers or property by railroad is 'casual' whenever such service or operation is so irregular or infrequent as to afford no substantial basis for an inference that such service or operation will be repeated, or whenever such service or operation is insubstantial." 20 CFR 202.6.

While there is no direct information available as to the amount of income generated by services provided by MIE in connection with rail transportation, in view of LKRR's gross income being less than two percent of MIE's gross income ($180,000.00 as compared with

$10,308,938.00), it must be inferred that the services rendered by MIE for LKRR clearly constitute an insubstantial portion of the operations of MIE. On this basis, the Board concludes that the services being performed by MIE for its rail carrier affiliate are casual, and, accordingly, that MIE is not an employer under the Acts. Cf. Rev. Rul. 84-91, 1984-1 C.B. 203, which held that the performance of services in connection with rail transportation was casual where the activities in question constituted less than 4% of the related company's activities.

TO : The Board

FROM : General Counsel

SUBJECT: Coverage Determination
Marietta Industrial Enterprises

Pursuant to the memorandum from the Management Member, attached please find a revised ruling with respect to the employer status of Marietta Industrial Enterprises, Inc.

Catherine C. Cook

Attachment